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## JUDICIAL CONSTRUCTION OF THE FOURTEENTH AMENDMENT.

THE subject of this article is the judicial definition of the following language of the Fourteenth Amendment to the federal Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The first clause protects only the privileges and immunities of citizens of the United States as such and not the privileges and immunities that belong of right to the citizens of all free governments. For the protection of the latter citizens must look to the states.<sup>1</sup> Most of the cases have arisen under the clauses securing to every person due process of law and to every person within the jurisdiction of a state the equal protection of the laws. It was intimated by the majority of the court in the Slaughter House cases that this clause also might be narrowly construed. Within three years after that decision the *dicta* were overruled, and it was assumed, apparently without question, that railroad corporations and owners of elevators had the right to appeal to the federal courts for protection

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<sup>1</sup> Slaughter House Cases, 16 Wall. (U. S.) 36 (1872).

against hostile legislation of Illinois, Wisconsin, and Iowa.<sup>2</sup> In the forty years that have since passed every word of these clauses has been defined.

### WHAT IS ACTION BY THE STATES ?

The action prohibited is action by the state. The question whether the prohibition is limited to action by the state government, — the legislature, — or extends to action by executive or administrative officers and by the courts of justice, soon arose in cases involving the right of colored men in the southern states to have men of their own race and color upon grand and petit juries. It was considered in three cases, one from West Virginia and two from Virginia.<sup>3</sup> The statutes of West Virginia excluded colored persons from juries. This was legislative action and clearly came within the prohibition against state action. The court held that Congress had the power to enforce by legislation the rights secured by the amendment, and that the act of Congress authorizing a removal of the cause to the federal courts was valid. The effect of the decision was to subject state legislation as to the constitution of juries to review by the federal courts.

In the Virginia cases the situation was different. Under the constitution and statutes of Virginia colored men were not excluded from juries. Their rights were not infringed by action of the state itself. If infringed at all, it was by the method of impaneling the jury and conducting the trial. The court held that the act of Congress authorizing the removal of causes did not apply, since it authorized only the removal of the case before trial and no one could know in advance of trial whether the right was to be infringed by judicial action or not. It was, however, distinctly said that the prohibitions of the amendment extended to all action of the state whether it acted by its legislative, its executive, or its judicial authorities.

In the third case a judge charged by the law of Virginia with the selection of jurors was indicted in a federal court because he excluded citizens of African race and black color from the jury lists.

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<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113 (1876).

<sup>3</sup> *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Virginia v. Rives*, 100 U. S. 313 (1879); *Ex parte Virginia*, 100 U. S. 339 (1879).

The attorney general of Virginia petitioned for a writ of *habeas corpus*. The case involved the action of a judicial officer, and the construction of a section of the act of Congress making it a misdemeanor to disqualify for service as a grand or petit juror any citizen on account of race, color, or previous condition of servitude. The question was whether it was within the power of Congress under the Constitution to interfere with the method of selecting jurors in state courts. It was held that under the clauses of the Thirteenth and Fourteenth Amendments authorizing appropriate legislation to enforce them, Congress had the power to pass the act in question, and that

“whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce the submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”

Although the power of the national government through congressional legislation to restrict the powers of the states to control the selection of jurors in their own courts, obviously trenches seriously upon the sovereignty of the states as it existed before the adoption of the amendment, the court held that it was no invasion of state sovereignty, since the people of the states had by the amendment empowered Congress to act. The language used as to the meaning of action by the state was very broad:

“Whoever, by virtue of public position under a State government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name of and for the State, and is clothed with the State’s power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.”

All these cases arose under acts of Congress and involved only the power of the court to enforce such an act. They did not involve its power by judicial action alone to protect individuals against unconstitutional statutes.

The next year the court went further.<sup>4</sup> The law of Delaware,

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<sup>4</sup> *Neal v. Delaware*, 103 U. S. 370 (1880).

as construed by the state courts, did not exclude colored men from juries. They were in fact excluded by the jury commissioners who made up the lists. A colored man moved to quash the indictment against him because in the selection of jurors his race was excluded and discriminated against by reason of their color. The state court refused to quash. Upon his conviction, he appealed to the United States Supreme Court upon the ground that he had been denied a right secured to him by the United States Constitution. His contention was sustained and the conviction reversed. In effect the action of the jury commissioners was held to be an act of the state prohibited by the amendment.

The distinction between state action and action of individuals is important. In 1876 it was decided that Congress could not legislate for the protection of the rights to due process of law and the equal protection of the laws against the acts of individuals. The Chief Justice said:

"The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."<sup>5</sup>

The question soon arose in another form. Congress in 1875 by the Civil Rights Act enacted that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement, and made it a misdemeanor for any person to violate the act by denying to any citizen except for reasons applicable to citizens of every race and color and regardless of any previous condition of servitude, full enjoyment of any of the privileges mentioned. The act was an attempt to regulate the conduct of individuals toward black men. Congress had no power to enact the statute except under the Fourteenth Amendment. The court held that it was not justified thereby.<sup>6</sup> Mr. Justice Bradley said:

"Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by

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<sup>5</sup> *United States v. Cruikshank*, 92 U. S. 542, 555 (1875).

<sup>6</sup> *Civil Rights Cases*, 109 U. S. 3 (1883).

power given to Congress to legislate for the purpose of carrying such prohibition into effect. Until some State law has been passed or some State action through its officers or agents has been taken adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceedings under such legislation can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority."

The legislative power of Congress for the enforcement of the Fourteenth Amendment is therefore limited to carrying out the prohibitions against state action, and does not extend to positive legislation securing to the individual the rights that the states were forbidden to deny him. The decision does not, however, prevent a review by the federal courts of the action of state authorities when that action violates the rights secured by the amendment as in *Neal v. Delaware*. Action of state courts adverse to rights secured by the amendment is subject to review by the federal courts.

It seems quite clear that acts of state officials in violation of state law cannot properly be considered acts of the state. So the court has held. It is for the states to enforce their own laws when violated by their own officials.<sup>7</sup> This rule, however, does not always prevent action by the federal tribunals where state officials by their administration of the law infringe on the rights secured by the amendment in spite of general provisions of the state constitution or statutes which in themselves are in harmony with the amendment. Where, therefore, a state board of equalization applied to one class of corporations a system of valuation differing wholly from that applied to other corporations of the same class, resulting in discrimination of a serious and material nature, through a mistake of method and not a mere difference of opinion, they were held subject to injunction by the federal court, even though their action was in violation of the express requirement of the state constitution requiring taxation of property in proportion to its value.<sup>8</sup>

The state may act not only through its legislature, courts, or administrative officers, but may delegate authority to municipalities. When municipalities in pursuance of authority delegated to them by the state, exercise legislative power, their proceedings by by-

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<sup>7</sup> *Barney v. City of New York*, 193 U. S. 430 (1904).

<sup>8</sup> *Raymond v. Chicago Traction Co.*, 207 U. S. 20 (1907).

law or ordinance have the force of law within the limits of the municipality and may properly be considered as law, that is as acts of the state.<sup>9</sup>

Not only is the rule applicable to the legislature, the judicial tribunals, administrative officers, and the subordinate agencies of the state, but also to the action of the people themselves, for a constitution cannot be adopted by the people of a state which shall override the provisions of the amendment. If that were permissible, the amendment would lose all force, since it would only be necessary to embody the legislation in the form of the fundamental law instead of the form of a legislative enactment.

#### THE ELEVENTH AMENDMENT.

The Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. The amendment is applicable also to suits against a state by its own citizens.<sup>10</sup> It was early decided, however, that the United States Supreme Court was not thereby prevented from reviewing the action of a state court by writ of error even when the state was a party on the record, and that the judicial power of the United States could be invoked whenever the correct decision of the case depended on the construction of the Constitution or a law of the United States.<sup>11</sup> The question of the extent of the power of the federal courts to enforce rights secured by the Fourteenth Amendment by proceedings against adverse state action has of recent years become of increasing importance, especially in cases affecting the regulation of railways and railway rates.<sup>12</sup>

Within a few years, state legislatures in order to escape from interference by the federal courts with the enforcement of state statutes have enacted drastic laws obviously intended to prevent the railroad companies from seeking the federal courts except at

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<sup>9</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

<sup>10</sup> *Hans v. Louisiana*, 134 U. S. 1 (1890) (even in a case arising under the Constitution or laws of the United States).

<sup>11</sup> *Cohens v. Virginia*, 6 Wheat. (U. S.) 264 (1821).

<sup>12</sup> *Fitts v. McGhee*, 172 U. S. 516 (1899); *Ex parte Young*, 209 U. S. 123 (1908); *Prout v. Starr*, 188 U. S. 537 (1903).

the risk of ruinous penalties in the event of failure in the litigation. Since the question in dispute might be one of some nicety and the decision might be doubtful, no corporation could safely take the risk of contesting under a Minnesota statute prescribing such penalties for a violation of the orders of the railroad and warehouse commission of that state. Injunctions were issued by federal courts restraining the railroad companies from reducing their tariffs to the statutory rates, and restraining the attorney general of Minnesota from enforcing the remedies or penalties prescribed. Notwithstanding the injunction the attorney general secured an alternative mandamus in a state court against one of the railroad companies. For this he was adjudged in contempt of the federal court. Upon appeal to the Supreme Court it was argued that the political or governmental powers of the state were involved; that the injunction of the federal court interfered with the administration of the criminal law of the state; that the right of a citizen to test the constitutionality of a statute under the federal Constitution could be preserved by allowing an appeal to the Supreme Court after, instead of before, the determination of the cause in the state court. The court did not decide whether the Eleventh Amendment must yield to the later expression of the will of the people contained in the Fourteenth. It assumed that each amendment existed in full force and that the Eleventh Amendment must have all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language fairly interpreted would warrant. The case was decided against the attorney general upon the ground that individuals who as officers of the state are clothed with some duty in regard to the enforcement of the laws of the state and threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce, against any parties affected, an unconstitutional act violating the federal Constitution, may be enjoined by a federal court from such action. The qualification which required that the state officer, in order that the federal courts might enjoin his action, should be clothed with some duty in regard to the enforcement of the laws of the state, was necessary, because nine years before<sup>16</sup> the court had decided that a suit brought by the receivers of a railroad against

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<sup>16</sup> *Fitts v. McGhee*, 172 U. S. 516 (1899).

law officers of Alabama to restrain the enforcement of the act reducing tolls was a suit against the state, and within the prohibition of the Eleventh Amendment; for it was said that if a case could be made for the purpose of testing the constitutionality of a statute by restraining law officers of the state who had no special relation to the statute alleged to be unconstitutional, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was in a general sense charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. In the later case the court said:

"the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. . . . If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The court disclaimed any power to restrain a state court from acting in any case brought before it, either of a civil or criminal nature, or any power to prevent any investigation or action by a grand jury. It was said that the grand jury was a part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government; that if an injunction against an individual is disobeyed and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account. Notwithstanding this reservation of the rights of the court and the grand jury, the decision is of the utmost importance, since it may well be doubted whether the reservation will be very effective in view of the right to enjoin individuals, including public officials, from prosecuting. The distinction between *Fitts v. McGhee* and *Ex parte Young* is difficult to follow; it may be that the later decision was thought to be required by the fact that the penalties, held *in terrorem* in the event of failure in

the litigation, made redress by the ordinary method of appeal after an adverse decision in the state courts an ineffective remedy. The legal rule was broadened to meet the new condition.

#### CORPORATIONS ARE PERSONS.

One clause of the amendment protects citizens of the United States, and provides that no state shall make or enforce any law which shall abridge their privileges or immunities. The other clauses protect persons, and provide that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The scope of the first clause had prior to the decision in the *Slaughter House* cases been restricted by the decision that corporations were not citizens.<sup>17</sup> Whether corporations were persons or not was undecided until 1886.<sup>18</sup> It is surprising that a decision so important and far reaching should have been rendered by the court in a summary way. The whole opinion is in less than six lines. The Chief Justice, before the case was argued, said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

No doubt the question had been thoroughly considered and discussed in the years that preceded the actual decision, and the decision was the result of matured judgment. The court looked behind the legal entity to the natural persons whose rights were involved.

#### THE DEFINITION OF LIBERTY.

The amendment protects persons in their life, liberty, and property. Life can hardly require definition, but the definitions of liberty and property and the limitations that may properly be imposed have been the subject of frequent adjudication. Blackstone defines the right of personal liberty as consisting in the power of locomotion, of changing situation, or moving one's person to whatever place

<sup>17</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868).

<sup>18</sup> *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394, 396 (1886).

one's own inclination may direct, without infringement or restraint unless by due course of law. This is obviously an imperfect definition, and even if we add to it what Blackstone includes under the right of personal security, the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation, we still fail to include some of the most valued elements of liberty as we conceive it. Mr. Justice Bradley as early as 1873<sup>19</sup> said that the right of the citizen to follow whatever lawful employment he chose to adopt was one of his most valuable rights, which the legislature of a state could not invade whether restrained by its own constitution or not.

The freedom to choose employment, the right to work, with the allied question of freedom of contract, were suggested from time to time, and in 1897 became the subject of express adjudication.<sup>20</sup> Allgeyer, a cotton broker in New Orleans, effected a policy of marine insurance by correspondence with an insurance company in New York. The company had not complied with the law of Louisiana. Under the statute of that state the state court held the broker liable for a penalty imposed upon persons who effected for themselves or another insurance on property in the state in a marine insurance company which had not complied with its laws. The United States Supreme Court held the statute invalid because it deprived the broker of liberty without due process of law. Mr. Justice White said:

"Liberty means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

The later decisions have pointed out limitations upon this broad definition of liberty. The importance of the discussion is great.

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<sup>19</sup> *Slaughter House Cases*, 16 Wall. (U. S.) 36 (1872).

<sup>20</sup> *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

That case dealt only with the limitations imposed upon the states by the Fourteenth Amendment; but since the same limitation is imposed upon the federal government by the Fifth Amendment, the discussion has involved the whole power of both state and federal governments to regulate business arrangements and combinations, the hours, conditions, compensation, and terms of payment of labor, the right to work without molestation, and the regulation of contractual liability of public service corporations and of common carriers. The prohibition of pooling contracts by railroads,<sup>21</sup> of contracts in violation of the Sherman Anti-Trust Act,<sup>22</sup> of dealing in futures in stocks and grain,<sup>23</sup> of the transportation of lottery tickets,<sup>24</sup> of the payment in advance of seamen's wages,<sup>25</sup> are all examples of limitations upon liberty of contract. The courts have sustained state statutes prohibiting combinations of dealers,<sup>26</sup> regulating the payment of wages,<sup>27</sup> and prohibiting assignments of future earnings except under certain conditions;<sup>28</sup> as well as statutes preventing fire insurance companies from denying that the property insured is worth the amount of the insurance,<sup>29</sup> and prohibiting sales in bulk except upon notice to creditors.<sup>30</sup> A state legislature may prescribe an eight-hour day for miners;<sup>31</sup> the hours during which women are allowed to work may be limited;<sup>32</sup> and the right to restrict the ordinary liberty of contract by legislation for

<sup>21</sup> *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *United States v. Joint Traffic Association*, 171 U. S. 505 (1898).

<sup>22</sup> *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).

<sup>23</sup> *Booth v. Illinois*, 184 U. S. 425 (1902); *Otis v. Parker*, 187 U. S. 606 (1903); *Gatewood v. North Carolina*, 203 U. S. 531 (1906).

<sup>24</sup> *Lottery Case, Champion v. Ames*, 188 U. S. 321 (1903).

<sup>25</sup> *Patterson v. Bark Eudora*, 190 U. S. 169 (1903).

<sup>26</sup> *Smiley v. Kansas*, 196 U. S. 447 (1905); *National Cotton Oil Co. v. Texas*, 197 U. S. 115 (1905); *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401 (1905); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86 (1909); *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433 (1910).

<sup>27</sup> *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404 (1899); *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (1901); *McLean v. Arkansas*, 211 U. S. 539 (1909) (method of weighing coal).

<sup>28</sup> *Mutual Loan Co. v. Martell*, 222 U. S. 225 (1911).

<sup>29</sup> *Orient Ins. Co. v. Daggs*, 172 U. S. 557 (1899).

<sup>30</sup> *Lemieux v. Young*, 211 U. S. 489 (1909); *Kidd v. Musselman Grocer Co.*, 217 U. S. 461 (1910).

<sup>31</sup> *Holden v. Hardy*, 169 U. S. 366 (1898).

<sup>32</sup> *Muller v. Oregon*, 208 U. S. 412 (1908).

the protection of workmen where the legislation bears a reasonable relation to the public health, the public safety, or public morals is thoroughly established.<sup>33</sup> "Contracting out" of the operation of a statute may be forbidden.<sup>34</sup> Strangely enough, the court held in the famous bake-shop case<sup>35</sup> that a limitation of the hours of labor for bakers similar to that which had already been sustained in the case of miners infringed individual liberty of contract. The court, however, did not question the legal principle, but only held it inapplicable to the particular facts. The result cannot be called satisfactory.

The line of cleavage between cases on one side or the other is difficult to define, perhaps not susceptible of definition in precise and accurate language. It must be determined like most legal questions, not by definition, but by a process of inclusion and exclusion. An illustration of a case on the other side of the line is the recent decision<sup>36</sup> that Congress cannot make it a criminal offense for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labor organization; such a statute would be an invasion of personal liberty.

Questions have arisen as to the power of Congress under the commerce clause to regulate the hours of labor in interstate railway traffic,<sup>37</sup> and to limit the right of an interstate carrier to escape the liability of a common carrier by special clauses for that purpose in its written contract with the shipper;<sup>38</sup> but it is settled that regulations of that character do not conflict with the liberty guaranteed by the Fifth Amendment. A state may require prompt settlement of claims by common carriers,<sup>39</sup> due diligence in transmitting telegrams,<sup>40</sup> fix the liability of a telegraph company for non-delivery

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<sup>33</sup> *Holden v. Hardy*, 169 U. S. 366 (1898); *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549 (1911); *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911); *Second Employers' Liability Cases*, 223 U. S. 1 (1911).

<sup>34</sup> *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 (1911).

<sup>35</sup> *Lochner v. New York*, 198 U. S. 45 (1905).

<sup>36</sup> *Adair v. United States*, 208 U. S. 161 (1908).

<sup>37</sup> *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911).

<sup>38</sup> *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 (1911).

<sup>39</sup> *Seaboard Air Line v. Seegers*, 207 U. S. 73 (1907); *Atlantic Coast Line v. Mazursky*, 216 U. S. 122 (1910).

<sup>40</sup> *Western Union Tel. Co. v. James*, 162 U. S. 650 (1896).

of a message at the damages sustained by the sender,<sup>41</sup> and prohibit contracts limiting liability for injuries made in advance of the injury received;<sup>42</sup> and may provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries.<sup>42</sup> Perhaps the most striking illustration of the extent to which the power of the state may go in restraint of individual liberty without violating the constitutional safeguards is the decision sustaining the compulsory vaccination act of Massachusetts in spite of the court's concession of the dangers that occasionally attend vaccination.<sup>43</sup>

The general position of the court has been recently stated as follows by Mr. Justice Hughes:<sup>44</sup>

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

"The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the several States.

"It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction."

The interpolation of the word "welfare" in addition to the words health, safety, and morals seems likely to have important results. The decision marks a recoil from the ruling in *Allgeyer v. Louisiana*.

#### THE DEFINITION OF PROPERTY.

Property includes, of course, tangible things, — real estate, and goods and chattels; it includes also intangible things, among which rights of action are conspicuous. With the increasing accu-

<sup>41</sup> *Western Union Tel. Co. v. Milling Co.*, 218 U. S. 406 (1910).

<sup>42</sup> *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549 (1911).

<sup>43</sup> *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

<sup>44</sup> *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 567, 568 (1911).

racy in the definition of property that has been made necessary by the attempt to establish just rules for the regulation of charges of public service corporations, many intangible kinds of property besides choses in action have been recognized. Claims have also been advanced to protection under the name of property that are fanciful. It has even been argued in a case <sup>45</sup> that arose under the Louisiana statute requiring railway companies to provide separate accommodations for white and for colored persons, that the reputation of belonging to the white race was property. The court intimated a view to the contrary.

The good will of a business is for some purposes at least regarded as property.<sup>46</sup> A right to lay rails in the public streets is a property right, and the rails do not cease to belong to the owners when the franchise to run the railroad is at an end;<sup>47</sup> but the right to lay gas pipes gives no right to a special location, and they may be removed to another location without infringing any property right, and without compensation for the cost of removal when the change of location is necessary for the purpose of a system of drainage for the public health.<sup>48</sup> The right to lay rails or pipes in a public street, although it has to do with visible and tangible things, is in itself intangible, and in the nature of a license. This license may amount to a contract within the protection of the clause of the Constitution forbidding a state to impair the obligation of a contract, and is then property which may be condemned under the power of eminent domain, and for it just compensation must be made.<sup>49</sup> Such a contract, however, is construed strictly in favor of the public.<sup>50</sup> Where it is provided that the corporation may charge rates fixed by ordinance, it is held that this means by ordinance from time

<sup>45</sup> *Plessy v. Ferguson*, 163 U. S. 537 (1896).

<sup>46</sup> 20 Cyc. 1276; *Menendez v. Holt*, 128 U. S. 514 (1888).

<sup>47</sup> *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116 (1907).

<sup>48</sup> *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453 (1905).

<sup>49</sup> *City Ry. Co. v. Citizens' Street Railroad Co.*, 166 U. S. 557 (1897); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (1897); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (1898); *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 (1902); *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904); *Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529 (1906); *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674 (1885); *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558 (1900).

<sup>50</sup> *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1906).

to time as may be deemed necessary.<sup>51</sup> Where the contract provides that no similar privilege shall be granted to any other person or corporation, the municipality itself is not precluded from establishing its own works.<sup>52</sup> But in spite of this rule of strict construction, where the city has granted an exclusive right for a certain time, the city itself is excluded from entering into competition during that time.<sup>53</sup> If a city charter so authorizes, the municipal authorities may even make a contract authorizing maximum rates which will be binding, and prevent a lowering of rates by subsequent legislation.<sup>54</sup>

While on the one hand the definition of property has been extended by including intangible elements, on the other hand the conception has been very much limited. In a highly organized society property rights tend to become less absolute and more relative. The doctrine *sic utere tuo ut alienum non lædas* acquires a more extensive application. The law of nuisances is a striking example. Certain uses of real estate offensive to the sense of smell or hearing of normal men are restrained by law, and in time offensive sights such as billboards may come under the same condemnation. Illustrations of the relative character of property rights are to be found in the right to travel on lands adjoining a highway when the road is foundrous, a right recognized by Blackstone; and the right to destroy buildings in the path of a fire to prevent its spread, a right asserted in a famous case by the most eminent judges of New Jersey sixty years ago, but denied by the lay judges of the court of last resort, — interesting because laymen were more careful of property rights than lawyers.<sup>55</sup> The ordinary incidents of ownership, says Mr. Justice Holmes,<sup>56</sup> may be cut down by the peculiar laws and usages of the state. Land may be taken for a public levee in Louisiana without compensation,<sup>57</sup> and the limitation on the claim for flowage by back water under the Massachusetts Mill Act has been sustained.<sup>58</sup> The right to reclaim swamp lands qualifies the rights

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<sup>51</sup> Freeport Water Co. v. Freeport, 180 U. S. 587 (1901).

<sup>52</sup> Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453 (1906).

<sup>53</sup> Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496 (1907).

<sup>54</sup> See cases above cited, notes 52-53.

<sup>55</sup> Hale v. Lawrence, 1 Zab. (N. J.) 714 (1848), reversing American Print Works v. Lawrence, 1 Zab. (N. J.) 248 (1847).

<sup>56</sup> Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 154 (1906).

<sup>57</sup> Eldridge v. Trezevant, 160 U. S. 452 (1896).

of individual landowners for the benefit of others.<sup>58</sup> The property right of railroads and public service companies is qualified, for it is subject to regulations prescribed by the state.<sup>59</sup> Striking instances of the qualified character of some rights of property have recently arisen out of the necessity of state regulation of the use of oil and natural gas deposits,<sup>60</sup> and the control of waters,<sup>61</sup> especially subterranean waters at Saratoga.<sup>62</sup> The court has gone further and held that great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of relatively small losses, without compensation, for some at least of the purposes of wholesome legislation.<sup>63</sup> Illustrations are to be found in the decision that the government may compel the removal of fences erected on a man's own land when they are so constructed by an ingenious arrangement as to enclose the government's land,<sup>64</sup> and in the decision sustaining the requirement of a lower fare on street railways for school children.<sup>65</sup>

A railroad company may be required to fence its tracks,<sup>66</sup> to protect grade crossings,<sup>66</sup> to stop trains at certain stations,<sup>67</sup> probably to check trains at grade crossings,<sup>68</sup> to elevate its tracks,<sup>69</sup> to build viaducts and tunnels, and when necessary change their location,<sup>70</sup>

<sup>58</sup> *Hagar v. Reclamation District*, 111 U. S. 701 (1884); *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9 (1885); *Wurts v. Hoagland*, 114 U. S. 606 (1885). As to arid lands, see *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896).

<sup>59</sup> In addition to cases above cited, see also *Louisville & Nashville R. Co. v. Kentucky*, 183 U. S. 503 (1902).

<sup>60</sup> *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1900).

<sup>61</sup> *Hudson Water Co. v. McCarter*, 209 U. S. 349 (1908).

<sup>62</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911).

<sup>63</sup> *Interstate Ry. Co. v. Massachusetts*, 207 U. S. 79, 87 (1907).

<sup>64</sup> *Camfield v. United States*, 167 U. S. 518 (1897).

<sup>65</sup> *Missouri Pacific R. v. Humes*, 115 U. S. 512 (1885).

<sup>66</sup> *Detroit, etc. Ry. v. Osborn*, 189 U. S. 383 (1903).

<sup>67</sup> *Gladson v. Minnesota*, 166 U. S. 427 (1897). Even where the trains are interstate trains. *Lake Shore & Michigan Southern Ry. v. Ohio*, 173 U. S. 285 (1899). Unless they are thereby compelled to turn from their direct interstate route. *Illinois Central R. Co. v. Illinois*, 163 U. S. 142 (1896). But interstate express trains cannot be required to stop when other trains are provided sufficient to accommodate the local business. *Cleveland, etc. Ry. Co. v. Illinois*, 177 U. S. 514 (1900); *Mississippi Ry. Commission v. Illinois Central R. Co.*, 203 U. S. 335 (1906); *Atlantic Coast Line v. Wharton*, 207 U. S. 328 (1907).

<sup>68</sup> *Southern Ry. v. King*, 217 U. S. 524 (1910).

<sup>69</sup> *New York & New England R. Co. v. Bristol*, 151 U. S. 556 (1894).

<sup>70</sup> *Chicago, Burlington & Quincy R. Co. v. Nebraska*, 170 U. S. 57 (1896); *West*

to establish stations,<sup>71</sup> to make connections with other roads,<sup>72</sup> to supply even at a loss enough trains and adequate service,<sup>73</sup> to supply local switching service<sup>74</sup> but not to construct private switches,<sup>75</sup> may be forbidden to heat its cars in a certain way,<sup>76</sup> and may be made liable for damage by fire.<sup>77</sup> Whether these requirements are justified under what is called the police power or under the right to regulate public service corporations, they constitute a serious modification of the right of private property, and their cumulative effect has been to impose vast expense upon the companies and to bring about a conception of the right of property very different from that probably entertained by the men who framed the amendment.

The greatest extension to the power of state legislation under the restrictions of the amendment is to be found in the recent decision sustaining the Oklahoma and Nebraska statutes requiring the guarantee of bank deposits. The court expressly said that it did not deny that the effect of the statute might be to take a portion of one bank's property without return to pay debts of a failing rival in business. It sustained the legislation because an ulterior public advantage might justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use, and because there might be other cases besides that of taxation in which the share of each party in the benefit of a scheme of mutual protection might be sufficient compensation for the burden it was compelled to assume. The police power, it was said, might be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and

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Chicago R. Co. v. Chicago, 201 U. S. 506 (1906); Chicago, Burlington & Quincy R. Co. v. Drainage Commission, 200 U. S. 561 (1906); Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583 (1908).

<sup>71</sup> Minneapolis & St. Louis R. Co. v. Minnesota, 193 U. S. 53 (1904).

<sup>72</sup> Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1 (1907).

<sup>73</sup> Wisconsin, etc. Ry. Co. v. Jacobson, 179 U. S. 287 (1900); Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1 (1907).

<sup>74</sup> Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612 (1909).

<sup>75</sup> Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196 (1910); Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262 (1910). But an absolute requirement to furnish a certain number of cars at a specified day transcends the police power of the state and amounts to a burden on interstate commerce. Houston & Texas Central R. Co. v. Mayes, 201 U. S. 321 (1906).

<sup>76</sup> New York, New Haven & Hartford R. Co. v. New York, 165 U. S. 628 (1897).

<sup>77</sup> St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1 (1897).

immediately necessary to the public welfare. It was, however, conceded that the use of the public credit on a large scale to help individuals in business was beyond the line.<sup>78</sup> A still stronger case of assertion of the public rights against the right of private property is the recent decree admitting future railroads to a joint ownership and control of the St. Louis terminals.<sup>79</sup>

There are cases that have limited state control of public service companies; thus a carrier cannot be required to deliver cars to another and connecting carrier without adequate provision for their return,<sup>80</sup> nor compelled to build a switch for a grain elevator on its own right of way.<sup>81</sup> Upon the whole the decisions lean in favor of the public, and toward the qualification of property rights.

#### DUE PROCESS OF LAW.

I pass by the efforts to define the meaning of the word "deprive." The distinctions are sometimes hard to follow; for instance, the distinction between flooding land by back water which deprives the owner of his property,<sup>82</sup> and the construction of public improvements which cut off the access of the riparian owner to the shore<sup>83</sup> which do not.

The prohibition of the amendment is not against depriving a person of his property, but against depriving him of his property without due process of law. The implication is that he may be deprived of his property if it is by due process. He may certainly be compelled to give up a portion by way of taxes for the use of the government; to exchange his property for its value in money by virtue of condemnation proceedings under the power of eminent domain; and he holds his property subject to the exercise of the police power,<sup>84</sup> a subject by itself.

<sup>78</sup> *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Shallenberger v. First State Bank*, 219 U. S. 114 (1911).

<sup>79</sup> *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912).

<sup>80</sup> *Louisville & Nashville R. Co. v. Central Stock Yards*, 212 U. S. 132 (1909); *St. Louis South Western Ry. Co. v. Arkansas*, 217 U. S. 136 (1910).

<sup>81</sup> *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196 (1910).

<sup>82</sup> *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166 (1871).

<sup>83</sup> *Gibson v. United States*, 166 U. S. 269 (1897); *Scranton v. Wheeler*, 179 U. S. 141 (1900); *cf. United States v. Lynah*, 188 U. S. 445 (1903); *Bedford v. United States*, 192 U. S. 217 (1904).

<sup>84</sup> *Mugler v. Kansas*, 123 U. S. 623 (1887); *Powell v. Pennsylvania*, 127 U. S. 678, 683 (1888).

That the citizen may be deprived of his property for purposes of the government by way of taxation has of course never been questioned. It is a plain and necessary limitation upon the right of property that the very government that creates, protects, and secures the right shall have the power to take some of the property for its necessary expenses. The amendment has brought about some limitations upon governmental power. It was early decided that the power of taxation could be exerted only for public purposes and not for private advantage.<sup>86</sup> The taxpayer seems entitled to some notice or opportunity to object to a proposed tax, but in the case of general taxes this may be the notice implied from the statute itself, of which the taxpayer may be supposed to know.<sup>87</sup> Special assessments for public improvements require more special notice and an opportunity for hearing,<sup>88</sup> including a right to support allegations by argument however brief, and if need be by proof however informal. But even special assessments for public improvements are not necessarily limited to special benefits conferred.<sup>89</sup> Property may be classified for purposes of taxation.<sup>90</sup> A special state tax on a sleeping-car company has been sustained in a case where the company was not obliged to accept intrastate business and could escape liability to the tax by ceasing the business within the state,<sup>91</sup> but this is rather a license fee than a tax.

A state cannot tax property unless within its jurisdiction;<sup>92</sup> but what is and what is not property within the jurisdiction of the state is a question of some nicety. An interstate railway or a telegraph line is in fact a unit, a whole, and its value as a unit is greater

<sup>86</sup> *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874).

<sup>87</sup> *Hagar v. Reclamation District*, 111 U. S. 701 (1884).

<sup>88</sup> *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); *Londoner v. Denver*, 210 U. S. 373 (1908).

<sup>89</sup> *Norwood v. Baker*, 172 U. S. 269 (1898), has been limited by *French v. Barber Asphalt Co.*, 181 U. S. 324 (1901); *King v. Portland*, 184 U. S. 61 (1902); *Chadwick v. Kelley*, 187 U. S. 540 (1903); *Schaefer v. Werling*, 188 U. S. 516 (1903); *Seattle v. Kelleher*, 195 U. S. 351 (1904).

<sup>90</sup> *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890); *Home Insurance Co. v. New York*, 134 U. S. 594 (1890); *Pacific Express Co. v. Seibert*, 142 U. S. 339 (1892); *Giozza v. Tiernan*, 148 U. S. 657 (1893); *Merchants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

<sup>91</sup> *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171 (1903).

<sup>92</sup> *Railroad Co. v. Jackson*, 7 Wall. (U. S.) 262 (1868); *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 423 (1870); *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300 (1872); *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206 (1873).

than the value of the sum of its parts in the different states appraised separately. To value the line properly for the purpose of taxation, it should be valued as a unit. It is impossible under our form of government to impose taxes on the line as a unit, since part is in one state and taxable by the government of that state, and part is in another and taxable thereby. A sensible rule has been adopted by which the value of the whole has been taken, and that value has been apportioned between the states in proportion to the mileage within each state.<sup>93</sup> This rule, however, may not always be just, since a large part of the total value may be due to railway terminals situate in one state alone, and that added value may be quite out of proportion to the mileage within the state. In such a case an apportionment on the mileage basis would give another state the advantage of the value, or a part of the value, of property outside its jurisdiction. In such a case a proper allowance must be made and the apportionment according to mileage must be modified.<sup>94</sup> Exact justice according to mathematical standard may be impossible; all that is required is a fair approximation to equality and an avoidance of arbitrary action; the rule of reason must be followed.<sup>95</sup>

A more difficult question has arisen out of the attempts to tax express companies by apportioning the entire value of their property, as evidenced by the value of their capital stock, among the states in proportion to the value of the property therein.<sup>96</sup> The result was a valuation for purposes of taxation many times in excess of the value of the tangible property; in effect the value of the franchise and the business as a going concern was distributed among the states, and states other than that of the company's domicile profited thereby. Since the earnings of an express company are for the most part compensation for services rendered, and bear but slight relation to the value of the tangible property in use, the tax is in substance a tax on the productive value of an established business and

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<sup>93</sup> *Pittsburgh, etc. R. Co. v. Backus*, 154 U. S. 421 (1894); *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439 (1894). The same rule applies to telegraph companies, *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888); *Postal Telegraph Co. v. Adams*, 155 U. S. 688 (1895); *Western Union v. Taggart*, 163 U. S. 1 (1896). And to parlor car companies, *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18 (1891).

<sup>94</sup> *Fargo v. Hart*, 193 U. S. 490 (1904).

<sup>95</sup> *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 616 (1899).

<sup>96</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897).

business connections. Railway cars constantly in transit may, however, be taxed on the basis of the average value within a state.<sup>97</sup>

The condemnation of property under the right of eminent domain resembles in some respects the right to take property by taxation. It is true that in legal theory the result of a condemnation is only to transmute the character of the property and to give the property owner the value in money. He is, however, deprived of the specific property, which he may prize far beyond the money equivalent; but he is deprived of it, in case proper proceedings are taken, by due process of law as the constitutional amendment permits. Like the power of taxation, the power of eminent domain can be exercised for public purposes only.<sup>98</sup> While there is no specific prohibition in the federal Constitution or the amendments against taking private property for a private purpose, such a taking is held to be a taking without due process of law. It falls ultimately, therefore, upon the United States Supreme Court, in deciding whether property has been taken without due process, to decide whether the use for which it is to be condemned is a public use. Irrigation for the benefit of landowners in an arid country,<sup>99</sup> the enlargement of the ditch of one man to supply water for another under the conditions existing in Utah,<sup>100</sup> an aerial bucket line for transportation of ore from a mine,<sup>101</sup> have recently been held to be public uses. A railroad corporation owning a majority of the stock of another railroad may be authorized by the legislature to condemn the stock of the minority.<sup>102</sup> These decisions seem to leave little limitation on the power of condemnation except that there must be a necessity for it, the proceedings must not be arbitrary, and compensation must be made.

In the requirement of compensation, the language of the Fourteenth Amendment differs from the Fifth. The latter expressly prohibits the federal government from taking private property for public use without just compensation; the Fourteenth, although it

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<sup>97</sup> *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899). Cf. *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905). And for the application to vessels, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905).

<sup>98</sup> *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896).

<sup>99</sup> *Fallbrook Irrigation District v. Bradley*, *supra*.

<sup>100</sup> *Clark v. Nash*, 198 U. S. 361 (1904).

<sup>101</sup> *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527 (1905).

<sup>102</sup> *Offield v. New York, New Haven & Hartford R. Co.*, 203 U. S. 372 (1906).

copies from the Fifth the clause immediately preceding against depriving a man of his property without due process of law, omits the clause requiring just compensation. This omission was once thought to be significant,<sup>103</sup> but it is now settled not only that the Fourteenth Amendment prevents the states from taking private property for public use without compensation, but that the United States Supreme Court will review proceedings in state tribunals in order to ascertain if the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the landowner's right to just compensation,<sup>104</sup> but will not review mere error in the administration of the law under which the proceedings were instituted.<sup>105</sup> The protection thus afforded by the federal courts to the right of private property extends to a case where the constitution of a state authorizes the taking without compensation, and the courts of the state attempt to cure the defect by inserting provisions for compensation in their judgments.<sup>106</sup>

The expression "due process of law" can be traced back to the time of Edward the Third, and is said to be equivalent to the words "the law of the land" in the Great Charter of John. After the lapse of centuries, it is still impossible to define the words with such precision and accuracy that we can always say with certainty what constitutes due process of law in a particular case. There has been more litigation and consequently more discussion as to their meaning and proper application in the last forty years than in the centuries that preceded, but we are still as doubtful in many cases as Mr. Justice Miller was at the time of the decision in *Davidson v. New Orleans*.<sup>107</sup>

The words must have had a different meaning in England from that we have learned to give them; since there was no thought that it was not due process of law to deprive a man of his liberty or property by a bill of attainder, or a bill of pains and penalties, or by *ex post facto* legislation, or by laws impairing the obligation of contracts; and the right to compensation for land taken for a public use depends upon acts of Parliament.<sup>108</sup> When the Fifth Amend-

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<sup>103</sup> *Hurtado v. California*, 110 U. S. 516 (1883).

<sup>104</sup> *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 246 (1896).

<sup>105</sup> *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1897).

<sup>106</sup> *Louisville & Nashville R. Co. v. Central Stock Yards Co.*, 212 U. S. 132 (1908).

<sup>107</sup> 96 U. S. 97 (1877).

<sup>108</sup> *Randolph, Eminent Domain*, 7.

ment was framed it must have been thought that holding a man to answer for crime without the presentment of a grand jury, and taking his property for public use without compensation, were proceedings distinct from want of due process; for by the Fifth Amendment these methods are expressly condemned, and such express prohibition would have been quite unnecessary if they had been included in the prohibition against depriving a man of life, liberty, or property without due process of law contained in the same amendment. Subsequent decisions have settled that due process of law does not require an indictment by a grand jury where the state enacts otherwise,<sup>109</sup> but does require compensation for private property taken for a public use.<sup>110</sup>

It was not an unnatural supposition, and Lord Coke's manner of discussing the phrase lends support to the idea,<sup>111</sup> that due process meant process of the courts in an orderly and regular procedure. It was settled many years ago that this definition was too narrow; that the Fifth Amendment was a restraint on the legislative as well as on the executive and judicial powers of the government; and that summary procedure in an accustomed way known to the law and not arbitrary was due process.<sup>112</sup> The scope of the prohibition against taking liberty or property without due process was soon widened by judicial decision. To this movement an early decision as to the meaning of the prohibition of *ex post facto* legislation may have contributed.<sup>113</sup> It was held that the prohibition related only to crimes. The court recognized the need for the protection of property and fundamental rights of the citizen against legislative encroachment, but rested the protection of the citizen upon rather vague and general notions of unexpressed limitation of governmental power and not upon any express constitutional provisions. The view then expressed is the foundation of the legal doctrine of vested rights, which in course of time came to be rested upon the due process clause. The theory of natural rights quite in harmony with the tendency of political thought in 1798 had prior to 1860 given way to

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<sup>109</sup> *Hurtado v. California*, 110 U. S. 516 (1884).

<sup>110</sup> *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226 (1897).

<sup>111</sup> 2 Inst. 51.

<sup>112</sup> *Murray's Lessee v. Hoboken*, 18 How. (U. S.) 272 (1855).

<sup>113</sup> *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798). See the able discussion by Edward S. Corwin, 24 HARV. L. REV. 366, 460.

an attempt at more precise definition of limitations upon legislative power resting upon the language of the Constitution; and the struggle between the doctrine of vested rights and the public necessity, between the individual and the state, that has ever since engrossed the courts, had begun.

The decision that due process of law does not necessarily mean judicial process becomes of increasing importance with the increasing complexity of administrative work and the necessity of leaving the final decision of many questions to administrative officers. The decisions of executive and administrative officers acting within powers expressly conferred by Congress are due process of law. Our immigration laws present a striking illustration.<sup>114</sup> The power to exclude aliens is a power affecting international relations, and vested in the political department of the government, to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the Constitution to intervene.<sup>115</sup> The jurisdictional fact in cases under the immigration acts is that the person concerned is an alien. The existence of that fundamental jurisdictional fact must be determined by some tribunal; it might have been decided that in the last resort this question was for the courts; it was, however, held that Congress has the power to commit the final decision of the question to administrative officers.<sup>116</sup> The importance of the result is shown by contrast with the decisions in rate cases that the determinations of administrative bodies are subject to judicial control.<sup>117</sup> The consequence is that in a probable case the right of a citizen to his liberty and to remain in the country of his birth may be finally determined by an executive officer, and even the writ of *habeas corpus* will afford him no redress. This result may have been necessary to avoid swamping the courts with numerous cases, as one of

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<sup>114</sup> *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892).

<sup>115</sup> *Fong Yue Ting v. United States*, 149 U. S. 698, 713 (1893).

<sup>116</sup> *Lem Moon Sing v. United States*, 158 U. S. 538 (1895); *Wong Wing v. United States*, 163 U. S. 228 (1896); *Fok Yung Yo v. United States*, 185 U. S. 296 (1902); *Chin Bak Kan v. United States*, 186 U. S. 193 (1902); *The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Turner v. Williams*, 194 U. S. 279 (1904); *United States v. Ju Toy*, 198 U. S. 253 (1890); *Tang Tun v. Edsell*, 223 U. S. 673 (1905).

<sup>117</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

the opinions suggests.<sup>118</sup> No doubt much latitude must be given to executive and administrative officers in order to protect them from the hazard of private actions for damages in case a court upon fuller investigation finds they have erred in the facts. Power must reside somewhere, and whether it shall finally rest in administrative officers or in courts of justice must sometimes be determined, not with logical nicety and precision, but with a view to limitations necessary in the practical conduct of government. Ordinarily a forfeiture must be decreed by judicial proceedings, but

“where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement.”<sup>119</sup>

Due process of law, the court has recently said, depends on circumstances. It varies with the subject matter and the necessities of the situation.<sup>120</sup> The governor of Colorado could not be held in damages for false imprisonment where a state of insurrection existed, and he in good faith but without sufficient reason held the plaintiff until he thought he could be safely released.

“When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.”

The court might have added “*Silent leges inter arma.*”

Although in cases of necessity or great public convenience the existence of a jurisdictional fact may be finally determined without resort to the courts, there are other cases where its existence is subject to judicial review, and where the federal courts may by virtue of the due-process clause of the Fourteenth Amendment review the action of the state courts. Judicial proceedings for the sale of lands of decedents have been held void when in fact the former owner was not dead,<sup>121</sup> but proceedings for the administration of the estates of absentees presumed to be dead have been sustained under a differently worded statute;<sup>122</sup> and the absentee's title may

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<sup>118</sup> *United States v. Sing Tuck*, 194 U. S. 161, 170 (1904).

<sup>119</sup> *Lawton v. Steele*, 152 U. S. 133, 140 (1894).

<sup>120</sup> *Moyer v. Peabody*, 212 U. S. 78 (1909).

<sup>121</sup> *Scott v. McNeal*, 154 U. S. 34 (1894).

<sup>122</sup> *Cunnius v. Reading School District*, 198 U. S. 458 (1905).

be barred and his property distributed without notice to him, at least when he is allowed one year within which to reclaim it.<sup>123</sup>

Due process of law requires service of process within the jurisdiction of the state in order to secure a personal judgment.<sup>124</sup> Notice and a hearing is essential, and even in the case of a proceeding *in rem*, like the foreclosure of a mortgage, the notice must be sufficient to enable the adverse party to make a defense;<sup>125</sup> a notice to a resident of Virginia to appear and answer a writ in Texas in five days is insufficient. But where Congress has power to sanction a prohibition by penalties enforceable by executive officers without judicial trial on the ascertainment in a prescribed manner of certain facts, no hearing in the sense of raising an issue and tendering evidence is necessary; a penalty imposed for bringing in immigrants afflicted with loathsome and contagious diseases was sustained, although the time allowed the steamship company to produce evidence was too short to enable it to do so.<sup>126</sup> In fixing rates, it is not always necessary that notice should be given and a hearing afforded to the public service corporation; where the corporation has the right to question the legality and reasonableness of the rates, and the time for fixing them is regulated by statute, no specific notice is required;<sup>127</sup> but if the corporation has no right or opportunity to question the legality or reasonableness of the rates, the procedure is not due process.<sup>128</sup> In matters of general taxation the requirement of notice is even less stringent, and it is sufficient if the taxpayer has any opportunity to question the amount.<sup>129</sup>

From the very first, attempts to bring under review in the federal courts by virtue of the due process clause alleged errors of law and fact that may have occurred in state courts or in proceedings under state authority<sup>130</sup> have been firmly resisted by the federal courts.

<sup>123</sup> *Blinn v. Nelson*, 222 U. S. 1 (1911).

<sup>124</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1887).

<sup>125</sup> *Roller v. Holly*, 176 U. S. 398 (1900).

<sup>126</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909).

<sup>127</sup> *San Diego Land Co. v. National City*, 174 U. S. 739 (1899).

<sup>128</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

<sup>129</sup> *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526 (1895); *Turpin v. Lemon*, 187 U. S. 51 (1902); *Longyear v. Toolan*, 209 U. S. 414 (1908); *Kentucky Union Co. v. Kentucky*, 219 U. S. 140 (1911).

<sup>130</sup> *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380 (1894). See also *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389 (1896); *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1898); *Wilson v. North Carolina*, 169 U. S. 586 (1898); *Louisville & Nash-*

Where a plaintiff has the benefit of a full and fair trial in the state courts, where his rights are measured not by law made to affect him individually, but by general provisions of law applicable to all in like condition, even if he can be regarded as deprived of his property by an adverse result, the proceedings are due process of law. A landowner is not deprived of property without due process because the amount awarded to him by commissioners as the value of his land is final.<sup>131</sup> Where the state provides adequate machinery for ascertaining compensation on notice and hearing which are availed of, and there is no ruling of the state court which prevents compensation for property actually taken, there is no lack of due process even if the amount awarded is only nominal.<sup>132</sup>

A right of appeal from the decision of a state board is not essential.<sup>133</sup> Indictment by a grand jury is not indispensable.<sup>134</sup> Trial by jury is not a privilege of the citizen protected by the amendment.<sup>135</sup> A verdict may be rendered by a jury of less than twelve men.<sup>136</sup> The rules of evidence may be changed,<sup>137</sup> and it may be enacted that one fact shall be *primâ facie* evidence of another fact, provided there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.<sup>138</sup> The common-law liability of a master to his servant may not only be enlarged, but the owner of a mine may be made liable for the wilful failure of the manager to furnish a reasonably safe place for the workmen.<sup>139</sup> The possession of policy slips by a person other than a public officer may be made presumptive evidence of possession knowingly in violation of law;<sup>140</sup> the derail-

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ville R. Co. v. Schmidt, 177 U. S. 230 (1900); Hooker v. Los Angeles, 188 U. S. 314 (1903); Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30 (1904).

<sup>131</sup> Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 (1897).

<sup>132</sup> Appleby v. Buffalo, 221 U. S. 524 (1911).

<sup>133</sup> Reetz v. Michigan, 188 U. S. 505 (1903).

<sup>134</sup> Hurtado v. California, 110 U. S. 516 (1884).

<sup>135</sup> Walker v. Sauvinet, 92 U. S. 90 (1875).

<sup>136</sup> Maxwell v. Dow, 176 U. S. 581 (1900).

<sup>137</sup> Pillow v. Roberts, 13 How. (U. S.) 472, 476 (1851); Marx v. Hauthorn, 148 U. S. 172, 181 (1893); Turpin v. Lemon, 187 U. S. 51 (1902); Raitler v. Harris, 223 U. S. 437 (1912).

<sup>138</sup> Mobile, Jackson & Kansas City R. Co. v. Turnipseed, 219 U. S. 35 (1910); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911).

<sup>139</sup> Wilmington Star Mining Co. v. Fulton, 205 U. S. 60 (1907).

<sup>140</sup> Adams v. New York, 192 U. S. 585 (1904).

ment of a railway car may be made *primâ facie* proof of negligence either in construction, maintenance, or operation.<sup>141</sup> On the other side of the line is the recent peonage case from Alabama; the statute enacted that the refusal or failure without just cause of any person, who had entered into a contract of service, to perform the service, should be *primâ facie* evidence of an intent to defraud and punishable by fine and imprisonment; this was held to violate the constitutional amendments by establishing involuntary servitude otherwise than as a punishment for crime.<sup>142</sup>

Efforts to induce the court to review the action of state authorities affecting the rights secured by the first ten amendments have not been successful. The decision in the Slaughter House cases in that respect has not been departed from, and most of the rights secured against federal legislation by the first ten amendments have been held to be rights of citizens of the states and not privileges and immunities belonging to them as citizens of the United States. The Fourteenth Amendment does not protect the citizen against alleged cruel and unusual punishment under state authority,<sup>143</sup> nor secure trial by jury in civil or criminal cases,<sup>144</sup> nor the right to bear arms,<sup>145</sup> nor immunity from prosecution except after indictment by a grand jury,<sup>146</sup> nor the right to be confronted by witnesses.<sup>147</sup> In these respects the federal Bill of Rights restricts the federal tribunals only. The Fourteenth Amendment does not subject state statutes and judicial decisions regulating procedure, evidence, and methods of trial to review by the federal courts provided the state courts have jurisdiction of the subject matter and the person, and notice and proper opportunity for hearing are given.<sup>148</sup> There are, however, some rights so fundamental in their character that a disregard of them involves want of due process of law. The right to have juries fairly chosen is one;

<sup>141</sup> *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35 (1910).

<sup>142</sup> *Bailey v. Alabama*, 219 U. S. 219, 238 (1911).

<sup>143</sup> *O'Neil v. Vermont*, 144 U. S. 323 (1892).

<sup>144</sup> *Walker v. Sauvinet*, 92 U. S. 90 (1875); *Maxwell v. Dow*, 176 U. S. 581 (1900).

<sup>145</sup> *Presser v. Illinois*, 116 U. S. 252 (1886).

<sup>146</sup> *Hurtado v. California*, 110 U. S. 516 (1884).

<sup>147</sup> *West v. Louisiana*, 194 U. S. 258 (1904).

<sup>148</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908); at page 111 Mr. Justice Moody says that subject to these two fundamental conditions the court has sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, as consistent with due process of law, and he collects the cases.

the right to compensation for land taken for public use is another; and it has recently been contended, but without success, that the privilege against self-incrimination was of the same fundamental character.<sup>148</sup> The question whether the provision against unreasonable searches and seizures is so fundamental that adverse action by the states is prohibited by the due-process clause, has been three times expressly reserved and is not yet decided.<sup>149</sup>

Penalties held *in terrorem* in the event of failure in litigation, as in the case heretofore cited, have been held to amount to a denial of due process.<sup>150</sup> To attempt by fear to dissuade the citizen from trying to enforce his rights in the judicial tribunals is hardly better than to require him in advance to agree to waive the rights given him by the federal Constitution. Much less can a state forfeit the right of a company to do business therein in case it brings suit in the federal court or removes a suit from the state court thereto.<sup>151</sup>

The result of the due-process clause is thus summed up by the Chief Justice in a recent case: <sup>152</sup> it

"does not operate to deprive the States of their lawful power and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due-process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

### EQUAL PROTECTION OF THE LAWS.

The clause prohibiting the states from denying the equal protection of the laws is limited to persons within the jurisdiction of the state, and is therefore less extensive in its scope than the due-process clause. The words "within its jurisdiction" were inserted with an object. In the same year in which it was decided that

<sup>149</sup> *Adams v. New York*, 192 U. S. 585 (1904); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908).

<sup>150</sup> *Ex parte Young*, 209 U. S. 123 (1908).

<sup>151</sup> *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910); *Pullman Co. v. Kansas*, 216 U. S. 56 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146 (1910); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910); *Western Union Tel. Co. v. Andrews*, 216 U. S. 165 (1910); *Herndon v. Chicago, etc. Ry.*, 218 U. S. 135 (1910).

<sup>152</sup> *American Land Co. v. Zeiss*, 219 U. S. 47, 66 (1910).

corporations were persons within the meaning of the amendment, it was held that a fire insurance company of Pennsylvania was not entitled as of constitutional right to do business in New York upon the same terms as New York companies, and that a state might impose more onerous terms upon a foreign than upon a domestic corporation, before permitting it to do business, since the foreign corporation was not within the jurisdiction until permitted to come by the action of the state.<sup>153</sup> Upon this rule depends the mass of legislation by the states for the control of foreign corporations. Since corporations are not citizens,<sup>154</sup> and are not persons within the jurisdiction until admitted, the control by the states is almost complete, subject to the due-process clause (which protects property, but does not prevent discriminatory legislation against corporations not amounting to a deprivation of property), and subject also to the commerce clause.<sup>155</sup> When, however, a corporation has once come into a state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, it is a person within the jurisdiction of the state, and entitled to the equal protection of the laws.<sup>156</sup> Although limited to persons within the jurisdiction of the state, the amendment applies to all within the territorial jurisdiction, without regard to differences of race, of color, or of nationality, and secures to all the protection of equal laws. It was successfully invoked for the protection of Chinese laundrymen in San Francisco against discriminating ordinances.<sup>157</sup> This clause has been invoked to limit the exercise of the police power, the power of taxation, of condemnation of private property for public use, of regulation of private business, and of labor, of methods of legal procedure, of restrictions upon freedom of contract, and the imposition of new liabilities. From the very beginning efforts have been constant and repeated to draw to the United States Supreme Court all sorts of cases under color of the claim that the appellant was deprived by the state of the equal protection of the laws. The court has, however, consistently held, as in the construction of the due-process clause, that it was not, as Justice Field

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<sup>153</sup> *Philadelphia Fire Association v. New York*, 119 U. S. 110 (1886).

<sup>154</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868).

<sup>155</sup> *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

<sup>156</sup> *Southern Railway v. Greene*, 216 U. S. 400 (1910).

<sup>157</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

expressed it, "A harbor where refuge can be found from every act of ill-advised and oppressive State legislation."<sup>158</sup> The attempt of the court to amplify the language of the amendment has, however, tended to increase the flood of litigation. In 1885 it said<sup>159</sup> that this clause of the amendment undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. So long a list of possible cases invited appeals to the federal courts for the protection supposed to be secured by the amendment. Yet in the very case in which that language was used, a municipal ordinance prohibiting washing and ironing in public laundries and wash houses within defined territorial limits, from ten o'clock at night to six in the morning, was held valid. At the same term it was held<sup>160</sup> that the ordinance was not an unwarrantable discrimination against persons engaged in the laundry business, because persons in other kinds of business were not required to cease from their labors during the same hours at night, since the risk of fire might not be so great.

At the next term<sup>161</sup> the court held that an ordinance forbidding any person to carry on a laundry in a building not of brick or stone, within the city and county of San Francisco, without obtaining the consent of the supervisors, was administered by the public authorities with a mind so unequal and oppressive as to amount to a prac-

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<sup>158</sup> *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (1885).

<sup>159</sup> *Barbier v. Connolly*, 113 U. S. 27, 31 (1885).

<sup>160</sup> *Soon Hing v. Crowley*, 113 U. S. 703 (1885).

<sup>161</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

tical denial by the state of the equal protection of the laws. It was as administered directed against Chinese only.

The three cases establish that the equal protection clause of the amendment secures all persons within the jurisdiction of the state against arbitrary laws or arbitrary administration of the law, but that laws may operate differently upon different classes, if the classification is founded upon a reasonable basis and is not arbitrary. It is enough if persons similarly situated are treated alike in privileges conferred or liabilities imposed.<sup>162</sup> The requirement of a license which was condemned when administered with an evil eye and an unequal hand is not necessarily arbitrary, and has been since sustained.<sup>163</sup> The decisions since 1885 are concerned with a definition of the bounds of a proper classification. The court has leaned strongly, as it ought, toward sustaining state legislation, even when the reasonableness of the classification was doubtful. The result has been to qualify greatly the general language of the amendment, but with all the qualifications, it still remains an important safeguard of the individual against arbitrary governmental action. It secures also to citizens of different states equal rights in other states which might otherwise be beyond the protection of the constitutional provision securing to the citizens of each state the privileges and immunities of citizens in the several states. It has even been suggested recently that the federal government may be subject to a similar limitation, but on what ground is not stated.<sup>164</sup>

Some illustrations of the line of cleavage between permissible classification and arbitrary classification will suffice to show the difficulty, always present in the law, of applying general language to concrete cases.

An attachment may be authorized against a non-resident defendant without requiring bond of the plaintiff, although a bond is required when an attachment is issued against a resident defendant.<sup>165</sup> In proceedings *in rem*, notice to a non-resident owner by

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<sup>162</sup> *Field v. Barber Asphalt Co.*, 194 U. S. 618, 621, 622 (1904).

<sup>163</sup> *Crowley v. Christensen*, 137 U. S. 86 (1890); *Gundling v. Chicago*, 177 U. S. 183 (1900); *Fischer v. St. Louis*, 194 U. S. 361 (1904); *Liebermann v. Van De Carr*, 199 U. S. 552, 560 (1905).

<sup>164</sup> *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909); *District of Columbia v. Brooke*, 214 U. S. 138, 149 (1909).

<sup>165</sup> *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84 (1899).

publication may suffice while personal service is required upon a resident owner,<sup>166</sup> since personal service may be impossible in the case of non-residents. Resident owners may be privileged to protest against a public improvement while non-resident owners may not,<sup>167</sup> since the presence within the city of the resident property owners, their direct interest in the subject matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-resident, whom it may be difficult to reach. It seems that criminal process may be employed against residents while civil process only is authorized against non-residents to enforce the same liability for a public improvement.<sup>168</sup> The stock of non-resident stockholders of a corporation may be assessed at its market value without deduction on account of real estate held by the corporation, while the stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax,<sup>169</sup> provided the non-resident pays only a state tax, and the resident pays a tax to the municipality in which he resides, and the state tax imposed upon the non-resident approximates in rate the municipal tax upon residents. This case, however, is rather one in which the tax imposed is not arbitrary, than one of classification strictly speaking, and is justified as a practical effort to apportion fairly the burden of taxation between residents and non-residents.

The wider scope of the power which the state possesses over corporations and joint-stock associations<sup>170</sup> justifies legislation relating thereto which would not be justified as to individuals; a foreign corporation may be restrained from doing business in case it has done certain prohibited acts whether within or without the state, and may be compelled to produce books and papers kept outside the state on pain of a judgment by default against it.<sup>171</sup> The attempt to introduce a factitious equality without regard to prac-

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<sup>166</sup> *Huling v. Kaw Valley Ry. Co.*, 130 U. S. 559 (1889); *Ballard v. Hunter*, 204 U. S. 241 (1907).

<sup>167</sup> *Field v. Barber Asphalt Co.*, 194 U. S. 618 (1904).

<sup>168</sup> *District of Columbia v. Brooke*, 214 U. S. 138 (1909).

<sup>169</sup> *Travelers' Insurance Co. v. Connecticut*, 185 U. S. 364 (1902).

<sup>170</sup> Joint-stock associations may be included with corporations. *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911).

<sup>171</sup> *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908); *Hammond Packing Company v. Arkansas*, 212 U. S. 322 (1909).

tical differences between individuals and corporations by appealing to the Fourteenth Amendment has been checked by the court.<sup>172</sup> The state of Tennessee made a violation of its anti-trust statute a crime, punishable in the case of natural persons by fine and imprisonment, and in the case of corporations by bill in equity and ouster. It was contended that this deprived corporations of the protection of a preliminary investigation by a grand jury, an indictment or presentment thereby, of trial by jury, and the right to have guilt established beyond a reasonable doubt. The court held that Tennessee was seeking to prevent a certain kind of conduct; the threat of fine and imprisonment was likely to be efficient for men, while the latter was impossible and the former less serious to corporations; and on the other hand ouster was likely to achieve the result with corporations but would be extravagant as applied to men; since there was thus a fundamental distinction in the evils that different delinquents might be forced to suffer, a distinction between the modes of establishing the delinquency might be justified.

Since the states may prescribe such conditions as they please for the admission of corporations of other states,<sup>173</sup> it follows that a distinction may be made between foreign and domestic corporations. A foreign corporation may be denied the right to participate on terms of equality with domestic creditors in the distribution of the assets of another foreign corporation, where an individual citizen of another state may not.<sup>174</sup> The permit of a foreign corporation to do business in the state may be revoked for violation of its laws against illegal combinations in restraint of trade.<sup>175</sup> But the control of the state over foreign corporations is limited by rights under the commerce clause,<sup>176</sup> and by the right to equal protection of a corporation which has entered the state in compliance with its laws and acquired property of a fixed and permanent nature.<sup>177</sup>

The state may, however, go further and may make a distinction between the liabilities of different corporations. A railroad company may be made liable for double damage for injuries to cattle where

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<sup>172</sup> *Standard Oil Co. v. Tennessee*, 217 U. S. 413 (1910).

<sup>173</sup> *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181 (1888).

<sup>174</sup> *Blake v. McClung*, 172 U. S. 239 (1898).

<sup>175</sup> *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 (1900).

<sup>176</sup> *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

<sup>177</sup> *Southern Ry. Co. v. Greene*, 216 U. S. 400 (1910).

it fails to erect fences and cattle guards,<sup>178</sup> and may be required by statute to fence its road,<sup>179</sup> to abolish grade crossings,<sup>180</sup> to rebuild a bridge over a natural watercourse with a larger opening when that is made necessary by an increase in the volume of water resulting from lawful and reasonable regulations by public authority established from time to time for the drainage of lands along the watercourse,<sup>181</sup> and may be subjected to a penalty for allowing noxious weeds to go to seed along its right of way.<sup>182</sup> A state may abolish the fellow-servant rule as to railway employees,<sup>183</sup> may as to them adopt an employer's liability act<sup>184</sup> even for the benefit of employees not exposed to dangers peculiarly resulting from the operation of a railroad,<sup>185</sup> but may also, on the other hand, subject railway postal clerks to the same disabilities as an employee.<sup>186</sup> The exemption from liability for damages sustained while engaged in the construction of a new road not open to public travel or use does not make the classification bad.<sup>187</sup> A railroad company may also be made liable for damages caused by fire communicated from its locomotives,<sup>188</sup> and required to pay an attorney's fee if it unsuccessfully defends litigation.<sup>189</sup> The peculiar liabilities thus imposed upon railroads find their justification in the peculiar hazards due to their operation. Where there is no such peculiarity, the reason justifying the classifi-

<sup>178</sup> *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (1885); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26 (1889).

<sup>179</sup> *Minneapolis & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364 (1893).

<sup>180</sup> *New York & New England R. Co. v. Bristol*, 151 U. S. 556 (1894).

<sup>181</sup> *Chicago, Burlington & Quincy Ry. Co. v. Drainage Commission*, 200 U. S. 561 (1906).

<sup>182</sup> *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267 (1904).

<sup>183</sup> *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205 (1888); *Minneapolis & St. Louis Railway Co. v. Herrick*, 127 U. S. 210 (1888); *Chicago, Kansas & Western R. Co. v. Pontius*, 157 U. S. 209 (1895).

<sup>184</sup> *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348 (1899).

<sup>185</sup> *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36 (1910).

<sup>186</sup> *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35 (1910).

<sup>187</sup> *Minnesota Iron Co. v. Kline*, 199 U. S. 593 (1905).

<sup>188</sup> *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1 (1896).

<sup>189</sup> *Atchison, Topeka & Santa Fe R. Co. v. Matthews*, 174 U. S. 96 (1899). A similar rule has been sustained as to a fire insurance company. *Farmers', etc. Ins. Co. v. Dobney*, 189 U. S. 301 (1903). And life and health insurance companies. *Fidelity Mutual v. Mettler*, 185 U. S. 308 (1902). The same principle is involved in *Orient Insurance Co. v. Daggs* (valued policy statute), 172 U. S. 557 (1899); *Northwestern National Life Ins. Co. v. Riggs*, 203 U. S. 243 (1906); *Seaboard Air Line v. Seegers*, 207 U. S. 73 (1907) (penalty for failure to adjust damage claims promptly).

cation ceases; a railroad company cannot be compelled to pay an attorney's fee if defeated in an ordinary suit for debt, where no individual and no other corporation is subject to that liability.<sup>190</sup>

In matters of taxation, the state may treat railroads as a class by themselves, since a railroad is a property situated in more than one taxing district, and with special characteristics that distinguish it from other property.<sup>191</sup> Where property has been omitted from taxation, the state may reach backward and collect taxes, and it may collect such taxes from railroads although it does not attempt to collect them from the owners of other property.<sup>192</sup> The regulations must proceed within reasonable limits and general usage, and must not amount to clear and hostile discriminations, especially such as are of an unusual character, unknown to the practice of our government.<sup>193</sup> Diversity of taxation, both with respect to the amount imposed and the species of property selected either for taxation or exemption, is not inconsistent with uniformity and equality in the proper sense of those terms, while a system that imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation.<sup>194</sup> It is hardly necessary to add that a railroad company may be compelled to bear the expenses of a state railroad commission, since those expenses result from the existence of the railroad and the exercise of its privileges.<sup>195</sup>

Not only may the state legislate for the control, regulation, and

<sup>190</sup> *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150 (1897).

<sup>191</sup> *Kentucky Railroad Tax Cases*, 115 U. S. 321 (1885); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890).

<sup>192</sup> *Florida Central, etc. Co. v. Reynolds*, 183 U. S. 471 (1902).

<sup>193</sup> *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890); *Columbus Southern Ry. v. Wright*, 151 U. S. 470 (1894). The rule has been applied to insurance companies, *Home Insurance Co. v. New York*, 134 U. S. 594 (1890). To telegraph companies, *Western Union Tel. Co. v. Indiana*, 165 U. S. 304 (1897). To express companies, *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Adams Express Co. v. Indiana*, 165 U. S. 255 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897). To bridge companies, *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897). To banks, *Merchants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

<sup>194</sup> *Pacific Express Co. v. Seibert*, 142 U. S. 339 (1892). And a street railway may be subjected to a special tax to which a steam railroad is not subject. *Savannah, Thunderbolt, etc. Ry. v. Savannah*, 198 U. S. 392 (1905). And a distinction in taxation may be made between a surface and a sub-surface railway. *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1 (1905).

<sup>195</sup> *Charlotte, etc. Co. v. Gibbes*, 142 U. S. 386 (1892).

taxation of railroads as a special class, but may even, where there is a reasonable basis for the distinction, legislate for one class of railroads and not for another. In an early case the court sustained a city ordinance that applied to one railroad only,<sup>196</sup> for the reason that no other person or corporation was or could be in like situation except with the consent of the city, and the ordinance, while apparently limited in its operation, applied to all who could do what it prohibited and was in effect general. There seems no reason to question that a class may have a single member, provided the distinguishing marks of the class bear a reasonable relation to the subject matter of the legislation;<sup>197</sup> in the absence of such distinguishing marks, legislation relating to a single corporation only may deprive it of the equal protection of the laws. In the Kansas City Stock Yards case,<sup>198</sup> legislation as to rates of charge was held bad because the statute applied to one corporation only, and the attempt to make it a class by itself because of the extent of its business was not sustained. Size may, however, in a proper case, be a good basis of classification. Proceedings for the forfeiture of large tracts of land because of the failure of the owner to have them listed for taxation have been sustained, although tracts of less than a thousand acres were exempt from forfeiture under like circumstances.<sup>199</sup> The reasonable basis for the classification was found in the fact that small tracts would probably be found in the actual occupancy of some one so that their extent or boundary could be readily ascertained for purposes of assessment and taxation; an underlying reason seems to have been the necessities of the public revenue. It is less difficult to see the reasonable basis of the classification where a statute provides for the inspection of mines only where more than five men are employed at any one time.<sup>200</sup> A special occupation tax upon wholesale dealers in oil has recently been sustained as based upon a reasonable classification,<sup>201</sup> and special restrictions upon small

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<sup>196</sup> *Railroad Company v. Richmond*, 96 U. S. 521 (1877).

<sup>197</sup> *Erb v. Morasch*, 177 U. S. 584 (1900).

<sup>198</sup> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 114 (1901).

<sup>199</sup> *King v. Mullins*, 171 U. S. 404 (1898).

<sup>200</sup> *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203 (1902); *McLean v. Arkansas*, 211 U. S. 539 (1909), sustaining a statute regulating the weighing of coal in mines where ten or more men were employed underground.

<sup>201</sup> *Southwestern Oil Co. v. Texas*, 217 U. S. 114 (1910). See also *Cook v. Marshall County*, 196 U. S. 261 (1908).

bankers have been sustained<sup>202</sup> upon the ground that legislation which regulates business may well make distinction depend upon the degree of evil,<sup>203</sup> although size must be an index to the evil to be remedied if it is to form a proper basis for classification.<sup>204</sup>

"An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."<sup>205</sup>

Time alone may justify classification;

"the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."<sup>206</sup>

Even the general sentiment of the community may suffice to justify regulations for the separation of white and colored persons on railway trains where there is no discrimination in the accommodations provided.<sup>207</sup>

Classification which may be valid for one purpose may not be for another. A special license tax upon persons carrying on the business of refining sugar and molasses and exempting planters and farmers grinding and refining their own sugar and molasses was sustained;<sup>208</sup> but two years later the exemption of producers and raisers of agricultural products and live stock from the provisions of the anti-trust statute of Illinois was held to make the act void.<sup>209</sup> This restriction of the power of the state is subject to some limitations; milk dealers may be singled out for special regulation under

<sup>202</sup> *Engel v. O'Malley*, 219 U. S. 128 (1911).

<sup>203</sup> *Heath & Mulligan Mfg. Co. v. Worst*, 207 U. S. 338 (1907).

<sup>204</sup> So railroads less than fifty miles long may be exempted from legislation forbidding the use of stoves on trains. *New York, New Haven & Hartford R. Co. v. New York*, 165 U. S. 628 (1897). And from the "full crew" law, *Chicago, etc. Ry. v. Arkansas*, 219 U. S. 453 (1911).

<sup>205</sup> *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 441 (1910).

<sup>206</sup> *Sperry & Hutchinson v. Rhodes*, 220 U. S. 502 (1911).

<sup>207</sup> *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910).

<sup>208</sup> *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89 (1900). See also *Clark v. Titusville*, 184 U. S. 329 (1902) (discriminating tax on merchants); *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452 (1901) (license tax on elevators situated upon a railroad right of way, but not on those situated elsewhere).

<sup>209</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

the sanitary code,<sup>210</sup> and different prohibitions and penalties may be provided as to producing and non-producing vendors of milk,<sup>211</sup> since these regulations bear a reasonable relation to the character of the business. Sales of stock on margin may be prohibited, although other forms of speculation are permitted;<sup>212</sup> and a tax of two cents a share may be imposed on transfers of stock based on par and not on market value, although no such tax is imposed on other transfers.<sup>213</sup> The last case is interesting because it suggests a qualification —

“The general expressions of the amendment must not be allowed to upset familiar and long established methods and processes by a formal elaboration of rules which its words do not import.”

Many different circumstances justify a difference of legislation. Differences of locality for purposes of legal procedure,<sup>214</sup> differences of population,<sup>215</sup> differences in sections of a city for the purpose of building regulations,<sup>216</sup> peculiarities in the construction of highways with reference to liability to damage from use by cattle,<sup>217</sup> difference between agricultural and other land with reference to annexation to a city,<sup>218</sup> difference between a city and other municipalities with reference to liability for damages in case of riots,<sup>219</sup> differences

<sup>210</sup> *Lieberman v. Van De Carr*, 199 U. S. 552 (1905).

<sup>211</sup> *St. John v. New York*, 201 U. S. 633 (1906). See also *Cox v. Texas*, 202 U. S. 446 (1906).

<sup>212</sup> *Otis v. Parker*, 187 U. S. 606 (1903).

<sup>213</sup> *Hatch v. Reardon*, 204 U. S. 152 (1907). Other cases in which distinctions have been sustained are: *Williams v. Fears*, 179 U. S. 270 (1900) (an occupation tax on “emigrant agents” hiring laborers to be employed beyond the limits of the state, although the business of hiring persons to labor within the state was not subject to the tax); *Armour Packing Co. v. Lacy*, 200 U. S. 226 (1906) (license tax on meat packers, but none on those selling their products, or on those packing articles of food other than meat); *Bacon v. Walker*, 204 U. S. 311 (1907) (prohibiting the grazing of sheep under certain conditions, but not the grazing of other cattle). *Williams v. Arkansas*, 217 U. S. 79 (1910) (prohibiting drumming or soliciting on trains for certain occupations but not for others).

<sup>214</sup> *Missouri v. Lewis*, 101 U. S. 22 (1879); *Hayes v. Missouri*, 120 U. S. 68 (1887); *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474 (1899); *Mallett v. North Carolina*, 181 U. S. 589 (1901).

<sup>215</sup> *Budd v. New York*, 143 U. S. 517 (1891) (regulation of elevator charges); *Mason v. Missouri*, 179 U. S. 328 (1900) (registration laws).

<sup>216</sup> *Welch v. Swasey*, 214 U. S. 91 (1909).

<sup>217</sup> *Jones v. Brim*, 165 U. S. 180 (1897).

<sup>218</sup> *Clark v. Kansas City*, 176 U. S. 114 (1900).

<sup>219</sup> *City of Chicago v. Sturges*, 222 U. S. 313 (1911).

in the character of articles upon some of which a representation of the flag may be placed though not on others,<sup>220</sup> differences of age for the purpose of enforcing a law for compulsory vaccination,<sup>221</sup> difference in degrees of relationship for the purpose of inheritance taxes,<sup>222</sup> difference between first and old offenders,<sup>223</sup> and between life prisoners and other convicts<sup>224</sup> for the purpose of punishment and of providing for an indeterminate sentence,<sup>225</sup> have all been held to justify differences in legislation.<sup>226</sup>

The amendment has drawn a vast mass of litigation to the federal courts, but there are few cases where state legislation has been set aside. Amid the labyrinth of decisions of which those I have cited are illustrations, the principle that has guided the court is that the object of the amendment was to prevent arbitrary action. Action is not arbitrary (1) if the discrimination is founded upon a reasonable basis, and (2) has relation to the subject matter of the legislation.<sup>227</sup> Questions as varied as the multitude of human affairs will arise. We must continue to define, as we have for forty years, by a process of inclusion and exclusion. Whether that process shall be conducted by the slower and more considerate process of the courts where both sides are heard and the court feels obliged to vindicate its conclusions by reason, or by the sometimes hastier but not always in the end more expeditious processes of an electorate or a legislative body which may substitute its will for reason, is a question of political expediency. A lawyer naturally prefers the existing method, hitherto the boast of our American system, but must recognize that under a different system the vague provision

<sup>220</sup> *Halter v. Nebraska*, 205 U. S. 34 (1907).

<sup>221</sup> *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

<sup>222</sup> *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (1898); *Billings v. Illinois*, 188 U. S. 97 (1903); *Campbell v. California*, 200 U. S. 87 (1906). The rule has recently been extended to a case of a transfer *inter vivos* creating a remainder after a life estate with a power of revocation. *Keeney v. New York*, 222 U. S. 525 (1911).

<sup>223</sup> *Moore v. Missouri*, 159 U. S. 673 (1895); *McDonald v. Massachusetts*, 180 U. S. 311 (1901).

<sup>224</sup> *Finley v. California*, 222 U. S. 28 (1911).

<sup>225</sup> *Ughbanks v. Armstrong*, 208 U. S. 481 (1908).

<sup>226</sup> See also *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61 (1911) (differences in manner and purpose of pumping natural mineral waters); *Provident Savings Institution v. Malone*, 221 U. S. 660 (1911) (savings bank a proper class for legislation as to unclaimed deposits).

<sup>227</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911), and *Mutual Loan Co. v. Martell*, 222 U. S. 225 (1911), are recent expressions of the court's view.

of the Great Charter has frequently served a useful purpose in protecting personal liberty and private property. Whatever system is followed, language must continue to be defined when it becomes necessary to apply it to concrete cases.

The practical result depends not so much upon the language of the written instrument or the statutory enactment, as upon the spirit in which the language is defined and the law administered. The framers of the constitution of New Jersey in 1844 followed closely the model of the federal Constitution. They had before them the federal Bill of Rights; they omitted the due-process clause of the Fifth Amendment, although they adopted other clauses; yet it has never been suggested that either liberty or property was less cared for in New Jersey than in her sister states with their more precise constitutional guarantees; and curiously enough in the great case that arose soon after that constitution was adopted, it was the laymen in the court of last resort who were most careful of the rights of private property, and not the lawyers; the lawyers, not the laymen, recognized the paramount right of the public necessity.

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